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IN THE

Supreme Court of the United States

October Term 1967

No. 744

GEORGE A. WALKER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
THE OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES, RULES OF COURT AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10
I. Dismissal of Petitioner from His Federal Employment Was Void Being in Violation of the Veterans Preference Act, 5 U.S.C. 863, in Two Respects:	
(a) There Was No Adequate Proof of the Charges and of Intent to Commit a Fraud and Name of Co-Conspirator Was not Provided, and	
(b) His Appeal to the Civil Service Commission Was Timely when Taken within a Reasonable Time after Recovering from a Mental Psychosis	12
II. A Federal Employee Answering a Notice of Proposed Removal from Employment Has a First Amendment Right to Include His Petition for Redress of Grievances and	

Page

a Failure by the Government to Meaningfully Process It Is a subtle Interference with a Constitutional Right Voiding that Employee's Removal from Employment. . 18

CONCLUSION 21

APPENDIX A-1

Opinion of United States Court of Claims, filed April 14, 1967 . . . . . A-1

Order of United States Court of Claims Denying Motion for Reconsideration, Entered July 20, 1967 . . . . . A-3

CITATIONS

Cases

Bates v. City of Little Rock,
361 U.S. 516, 80 S. Ct. 412 21

Carter v. United States,
102 U.S. App. D.C. 227, 252 F.2d 608 . . . 15

Gernand v. United States,
174 Ct. Cl. 936 16

Gmo. Niehaus & Co., et al., v. United States,
373 F.2d 944 18

New York Times v. Sullivan,
376 U.S. 254, 84 S.Ct. 710 19

Page

Rogers v. United States,
340 U.S. 367, 71 S.Ct. 438 16

Swaaley v. United States,
Court of Claims, No. 405-65,
decided May 12, 1967. 9,11,18,19

Turner v. Kennedy;
118 U.S. App. D.C. 104,
332 F.2d 304 11,19,20

Urbina v. United States,
Court of Claims, No. 113-63,
decided May 12, 1967. 9,10,16,17

Constitutional Provisions and Statutes Involved

Amendment I to the Constitution of the United States 3

Amendment V to the Constitution of the United States 3

Section 14 of the Veterans Preference Act of 1944, 58 Stat. 387, as amended 5 U.S.C. 863 3

Page

Regulations

Civil Service Commission Regulations,
5 CFR 752.203 (a) and (b)(1) 3
5 CFR 752.203 (3)(i) 4
5 CFR 752.203 (4) 4

Federal Personnel Manual, Appendix C
to Section 5, Procedures Under
Part 22, Sec. A.2 4

Rules of the United States
Court of Claims

19(b) 4
64(d) 4

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a Writ of Certiorari issue to review the erroneous decision and judgment of the United States Court of Claims entered July 20, 1967.

THE OPINION BELOW

The Opinion of the Court of Claims dated April 14, 1967, is not reported, but is printed in the Appendix hereto, *infra*, page A-1.

JURISDICTION

The judgment of the Court of Claims is dated July 20, 1967, was entered July 20, 1967, denying Petitioner's Motion for Reconsideration, and is printed in the Appendix hereto, *infra*, page A-3.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1(a). Whether Petitioner's dismissal from federal employment violated the Veterans Preference Act there being no proof of intent to fraudulently apply for and receive a rental allowance since he had previously transferred in good faith title to a home into an irrevocable trust naming his daughter beneficiary and his wife trustee to whom he paid monthly rent.

(b). Whether Petitioner's appeal to the Civil Service Commission was timely within the provisions of the Veterans Preference Act, though not filed within 10 days after notice of adverse action as regulations of the Commission required, but was filed within a reasonable time after recovering from a proved mental psychosis.

2. Was Petitioner's removal from the Federal civil service void being in violation of his right to Petition for Redress of Grievances since he included such a petition in his answer to charges and in his appeals to the Civil Service Commission and the Petition was subtly interferred with, there being no meaningful processing of it to higher effective authorities and there was no known action taken upon it.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES OF COURT AND REGULATIONS INVOLVED

Amendment I to the Constitution of the United States:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

Amendment V to the Constitution of the United States:

"No person shall * * * be deprived of life, liberty, or property without due process of law;**".

Section 14 of the Veterans Preference Act of 1944, 58 Stat. 287 as amended 5 U.S.C. 863:

"No permanent or indefinite preference eligible, **** shall be discharged, *** except for such cause as will promote the efficiency of the service and for reasons given in writing *** such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, *** and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision:**".

Civil Service Commission Regulations:

5 CFR 752.203:

"(a). Right of Appeal. An employee is entitled to appeal to the [Civil Service] Commission from an adverse action covered by this subpart ***".

"(b). Time Limit. (1) *** an employee may submit an appeal at any time after receipt of the notice of

adverse decision but not later than 10 days after the adverse action has been effected."

"(2). ***"

"(3(i). An appeal may not be processed concurrently by the Commission under this part and by an agency under the agency appeals system established under Part 771 of this Chapter".

(ii). ***"

"(4). The Commission may extend the time limits in this paragraph when the appellant shows that he was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit".

Federal Personnel Manual, Appendix C to Section 5, Procedures under Part 22, Sec. A.2: "The notice must state any and all reasons supporting the proposed action, specifically and in detail (names, times, places, etc.). The reasons must be given specifically enough, and in sufficient detail, that the employee may understand clearly the alleged grounds for the proposed action, know the particular offenses or deficiencies charged against him, and thus be in a position to submit his defense.****".

Rules of the United States Court of Claims:

"19(b). Affirmative Defenses: In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense".

"64(d). Motion and Proceedings Thereon: After a motion for summary judgment has been filed *** and has been served *** and after expiration of the time allowed *** for filing a response thereto, such motion *** shall

be assigned to the calendar. The judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

STATEMENT OF THE CASE

Petitioner, a veterans preference eligible, was working in 1961 as a civilian employee for the Air Force as an Administrative Assistant, GS–9, at the 6313th Air Base Wing, Kadena, Air Force Base, Okinawa. (R13).

By letter of August 31, 1961 he was notified of the proposal to remove him from his civil service position. This letter charged him with conspiring to defraud the United States by conniving practice to purposely circumvent government regulations for personal financial gain. (R 23-25). It did not name his co-conspirator nor state that the name was unknown. The fraud charged was that he applied for and received excessive quarters allowance in that he was reimbursed for rent he never paid, that in fact he owned his home though titled in the maiden name of his Japanese wife. (R 23, 24). Petitioner answered in writing denying the fraud, stated he paid $80.00 a month rent to Noyo Yamakawa, the maiden name of his Japanese wife, because on June 1, 1960, he had created a written trust and conveyed the house into the trust, naming his wife Trustee with his daughter the beneficiary. (R 23, 24, 26). He also advised in effect that under Japanese law in Okinawa it was customary to place title in the maiden name of the wife. (R 23). In this answer to the charges he asked for an investigation stating his removal was occasioned by an upheavel within the Command and the result of an earlier attempt to remove him "which had no substance and never materialized". (R 26, 27). On October

16, 1961 he was notified in writing a decision had been made to remove him effective upon his arrival at his residence in the United States (R. 28) that being December 21, 1961. (R 51). He was advised of his appeal rights, either to the higher echelon of the Air Force under the Grievance and Appeal Procedures or to the Civil Service Commission (R 28), but that he could not pursue both (R 31). Regulations of the Civil Service Commission, 5 CFR 752.203 (b)(3)(i) precludes an appeal to the Commission if the employee files an agency grievance appeal. Petitioner filed neither appeal then. He filed appeals to the Civil Service Commission in 1964.

Between the date of arrival at his United States residence, December 21, 1961, and June 14, 1962, he remained there ill. (R 40). Because of a suicide attempt he was hospitalized on June 14, 1962, as a mental patient in the Westborough State Hospital, Westborough, Massachusetts. (R 65). Massachusetts' law does not permit hospitals to provide copies of medical records without supoena (R 64) but it did provide a short diagnostic summary (R 65, 66), which states Petitioner has an "Involutional Psychotic Reaction, Depressive Reaction, manifested by depression, retardation, feelings of despair and hopelessness in the involutional age". He remained there until transferred to the Veterans Administration Hospital, Bedford, Massachusetts on January 15, 1963, where he remained until discharged February 5, 1964. (R 67). His diagnosis at this Veterans' hospital was "Involutional Psychotic Depressive Reaction in partial remission" at discharge. (R 68).

The Veterans Administration concluded on December 12, 1963, that he was totally disabled and waived the premiums for his National Service Life Insurance and finding also such total disability continued from November 14, 1961. (R 72). The Civilian Personnel Officer in Okinawa stated (but not under oath) that he had talked with Lt. Col. Wm. Hannum,

USAMSG, on October 31, 1961, who had concluded Petitioner was capable of a mature evaluation of the facts and had the capacity to comprehend the importance of the action taken. (R 89).

On March 22, 1964, about a month and a half after discharge from the Veterans Hospital, Bedford, Massachusetts, Petitioner appealed in writing to the San Francisco Region, Civil Service Commission (R 38, 39, 40) stating the medical reasons why he had not appealed earlier but also listing these grievances (R 39):

> "The charge was totally unjust and was inspired by a political wrangle between the Commander of the Unit to which I was assigned and his deputy. Because of my loyalty to the Commander the Deputy avowed on more than one occasion that he was going to get me after he had succeeded in getting the Commander. Being of a lesser rank he could not make a frontal attack but did through a whispering and underhanded attack. Once the Commander was removed he worked to get me removed and when the question of transfer of my house to my wife as trustee for the benefit of my daughter was made and this was later questioned he had the base to construe this as something sinister. When I realized that I was being ganged upon through a whispering and fictional group, I became alarmed, highly nervous and since the charges were so slow in coming it sapped my morale completely so that when the charges were made I was a nervous wreck and unable to present a timely and proper defense."

This appeal was denied as untimely on April 2, 1964 (R 41-43). That office also stated Dr. Hannum's medical opinion refuted Petitioner's claim of illness since he was competent according to the doctor. (R 42). That office was cognizant of the Veterans Administration conclusion Petitioner was totally disabled from November 14, 1961 (R 43) but chose

to disregard this expert evidence for the hearsay medical conclusion as reported by a layman, the Civilian Personnel Officer.

On April 22, 1964, Petitioner filed an appeal with the Board of Appeals and Review, United States Civil Service Commission, Washington, D.C. (R44-49) in which he reiterated his past illnesses and stated these grievances (R 44-49):

> "In the organization to which I was assigned was a woman employee who became my subordinate and who had tried to get the job to which I was assigned but failed for lack of qualifications. This woman at the outset and throughout my tenure of the job conspired with the military superiors to discredit me in order to get my job. The writer is 1/20th colored and this fact was suspected and used by this woman to spread rumors and hate among assigned personnel. This continued with each succeeding officer so that at various times it was proposed to abolish my job, reduce my grade and other harassing tactics used. When a new Commander was assigned the same process was used over and over. Then in 1960 a new deputy to the Commander was assigned and it soon became apparent that they did not see eye to eye. I was loyal to the Commander as required by my job and this Major was from Little Rock, Arkansas, so this woman quickly sought to appeal to his aversion to a person of color. Because of his dissention (sic) with the Commander the organization suffered and in 1960 an IG annual inspection of the organization was severely critical. The deputy tried to place the blame for the poor showing of the organization on me since because of rank he could not blame the Commander, a Lt. Colonel. Finally, through political and fraternal association he succeeded in having the Commander relieved of his post and avowed to get me."

This appeal was denied May 4, 1964 as untimely (R 51). On May 11, 1964 (R 52) and June 22, 1964 (R 54) reconsideration

was requested but denied. (R 54). Plaintiff filed his complaint in the Court of Claims July 1, 1965, invoking jurisdiction pursuant to 28 U.S.C. 1491.

There was no hearing below upon the merits but Respondent's Motion for Summary Judgment was granted April 14, 1967. (R 96, 97). The lower court concluded Petitioner was caught in this dilemna: If the court upheld the holding of the Civil Service Commission that Petitioner's illness was not an acceptable excuse then the untimely appeals (sic)[1] constituted a failure to exhaust administrative remedies, but if the court excused the tardiness of the appeals and accepted the existence of the illness as debilitating then he could not recover because of his failure to be ready, willing and able to work for the period involved. (R 97). This affirmative defense of "ready, willing and able", was not affirmatively pleaded as Rule 19 of the lower court requires. On May 10, 1967, Petitioner filed a Motion for Reconsideration stating this contention and also filed a Supplement on June 2, 1967, calling attention to two subsequent opinions of that court which were, he believed, inconsistent with the holdings in his case. *Swaaley v. United States,* No. 405-65, decided May 12, 1967, and *Urbina v. United States,* No. 113-63, decided May 12, 1967. Both are unreported. *Swaaley* involved the vacating of a removal from federal employment because the employee's letter constituted a Petition for Redress of Grievances and could not be the subject of a removal proceeding. *Urbina* involved a situation very similar to Petitioner's case since it,

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[1] But the Agency said he could not appeal through the Grievance Procedure if he went to the Civil Service Commission and Civil Service regulations preclude him from appealing to it if he followed the Agency grievance appeals. Both violate the Veterans Preference Act which give the eligible an absolute right to appeal to the Commission. See Argument I *infra.*

too, was concerned with alleged fraud in claiming rental allowances for a house titled in the name of *Urbina's* brother-in-law. Petitioner's Motion for Reconsideration was denied July 20, 1967 (R. 115, 116).

REASONS FOR GRANTING THE WRIT

The Court of Claims failed to decide the timeliness of Petitioner's administrative appeals in the light of the Veterans Preference Act allowing a preference eligible to appeal to the Civil Service Commission within a reasonable time. Under the circumstatces of this case Petitioner did appeal within a reasonable time after recovering from a mental psychosis. His removal violated the Veterans Preference Act. He was chargèd with intent to defraud but there was no proof of thi this since he obtained rental allowances properly having previously conveyed title to his home in good faith to his wife, as trustee for his daughter. He actually paid rent to the trustee. These issues were decided by the court below upon a motion for summary judgment and since issues of fact existed summary judgment was precluded. Important questions of federal law, the Veterans Preference Act, exist and apply to a large number of veterans employed in the civil service of the United States. It is believed that this question of federal law has not been but should be settled by this Court.

The court below failed to consider Petitioner's letters to his Agency and to the Civil Service Commission Regional Office and to its Board of Appeals and Review as Petitions for Redress of Grievances encompassed by Amendment I to the Constitution of the United States. The Court of Claims has held that a federal employee may file such a petition and that it cannot be hindered or delayed nor used as a basis for removal unless the statements made in it are made with

knowledge of their falsity or with reckless disregard of their falsity. *Swaaley v. United States,* No. 405-65, decided May 12, 1967. This is in direct conflict with the holding of the majority of the United States Court of Appeals for the District of Columbia Circuit in *Turner v. Kennedy,* 118 U.S. App. D.C. 104, 332 F.2d 304 (1964). The facts are found in Judge Fahy's dissenting opinion in which he held that the employee's letter to Congress was protected by the First Amendment and by 5 U.S.C. Section 652(d) which provides that federal employees may petition Congress and that the petition shall not be denied or interfered with. *Turner* was removed because his statements were said to be false, unjustified and reprehensible. Both *Swaaley* and *Turner* involved dismissals based on the statements contained in the petitions being false or slanderous. Petitioner's grievance was not used, so far as is known, as a reason for dismissal but there was a subtle stifling of it since there was a failure to forward it to higher headquarters for action, failure to notify him of what action was taken on it and whether it was found to baseless or not. This constitutes a delay, interference or hindrance to his Constitutional rights. This is an important question of Constitutional law which is in conflict between two United States Courts and which has not been, but should be, settled by this Court.

I.

DISMISSAL OF PETITIONER FROM HIS FEDERAL EMPLOYMENT WAS VOID BEING IN VIOLATION OF THE VETERANS PREFERENCE ACT, 5 U.S.C. 863, IN TWO RESPECTS:

(a) There Was No Adequate Proof of the Charges and of Intent to Commit a Fraud and Name of Co-Conspirator Was not Provided, and

(b) His Appeal to the Civil Service Commission Was Timely when Taken within a Reasonable Time after Recovering from a Mental Psychosis.

Section 14 of the Veterans Preference Act of 1944, 58 Stat. 387, as amended 5 U.S.C. 863, endows preference eligibles with a bundle of rights, powers, privileges and immunities. Among these are the right to be advised in writing, prior to removal of the reasons therefore and the right to appeal to the Civil Service Commission within a reasonable time. That Section of the Act reads in parts:

> "No permanent or indefinite preference eligible, **** shall be discharged, *** except for such cause as will promote the efficiency of the service and for reasons given in writing; *** such preference eligible *** shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, *** within a reasonable length of time after the date of receipt of notice of such adverse decision: ****."

The Civil Service Commission requires the appeal not later than 10 days after the adverse action, 5 CFR 752.203 (b)(1) but the 10 days period may be extended if the individual was not aware of the decision or was prevented by circumstances beyond his control from appealing within the time limit, 5 CFR 752.203(4).

Petitioner's removal was effective December 21, 1961, the date of his return from Okinawa to his residence in the United States. (R 28, 51). The history and diagnosis of his mental illness have not been controverted for the period involved here. From December 21, 1961 to June 14, 1962, he remained at home ill. (R 40). Because of an attempt at suicide he was confined as a mental patient on June 14, 1962, in the Westborough State Hospital, Westborough, Massachusetts (R 65). That hospital is not permitted to release medical records except upon subpoena (R 64), but it did release Petitioner's diagnosis and brief history. Its diagnosis was: Petitioner was suffering from "Involutional, Psychotic Reaction, Depressive Reaction, manifested by depression, retardation, feelings of despair and hopelessness in the involutional age" (R 66) and that this illness dated "back to about 9 months ago" (R 65). On January 15, 1963, he was removed to the Veterans Administration Hospital, Bedford, Massachusetts, which on January 15, 1963 stated (R 69):

> "This 59-year-old mulatto NSC male has a history of moderate depression dating back to childhood when his family life was broken due to the death of his parents followed by a struggle for an education in which he ultimately succeeded. His present illness, however, began in Japan when he married a native girl while a civilian employee of the Air Force."

And this diagnosis was provided (R 68):

> "Involutional Psychotic Depressive Reaction in partial remission."

Thus, both hospitals were in substantial agreement that Petitioner was psychotic during the critical periods involved. There is some hearsay upon hearsay statement, not under oath, that the Personnel Officer in Okinawa checked with Lt. Col. Wm. Hannum, USAMSG, on October 31, 1961, who

related that he concluded Petitioner was capable of maturely evaluating facts and had tne capacity to comprehend the importance of the actions taken. (R 89). There is nothing to show the doctor's qualifications or whether he is a psychiatrist, whether if ever he examined Petitioner and if so for how long, and no facts are revelaed showing how the doctor arrived at his diagnostic conclusions. An opportunity to cross-examine the doctor was not provided nor does it appear that Petitioner knew of this medical opinion.

The Veterans Hospital discharged Petitioner February 5, 1964 (R 67). On March 22, 1964, he appealed his removal to the San Francisco Region, Civil Service Commission, setting forth his mental depression (R 39, 40). That Office replied April 2, 1964, denying the appeal as untimely (R 41) stating as to the illness that it relied on Dr. Hannum's conclusion in Okinawa that Petitioner was competent. (R 42). That Regional Office, however, knew of the conclusion of the Veterans Administration that Petitioner was totally disabled since November 21, 1961 (R. 43), but chose to ignore this Governmental Agency's medical diagnosis. Petitioner on April 8, 1964 appealed to the Board of Appeals and Review of the Civil Service Commission which denied the appeal May 4, 1964 as untimely but further stated about the disability (R 51):

> "The Board of Appeals and Review has given careful consideration to the entire record in your case, including the fact that you have been awarded total disability by the Veterans Administration. However, the very fact that you, or someone in your behalf, initiated the action with the Veterans Administration leads the Board to the assumption that a timely appeal could also have been made to the Civil Service Commission."

But the Veterans Administration itself, through its contact representative at the Veterans Hospital, Bedford, Massachusetts,

instituted the necessary action to waive the National Service Life Insurance premiums because Petitioner was totally disabled. (R 52). The Air Force ought to have been as tender and hospitable and so should the Civil Service Commission and its Regional Office. Petitioner in his letter to the Board of Appeals and Review, May 11, 1964, advised that he had initiated an appeal January 10, 1963 while a patient at Westborough State Hospital. This letter is not in the record but is presumably in the Respondent's files.

Since it is not factually or medically properly questioned that Petitioner was suffering from a psychosis there ought to be an inquiry whether that mental condition blocked his ability to protect himself in a personnel discharge but at the same time did not preclude his working. This traumatic split and the mental illness and its effects are proper subjects for medical experts. Mental health or illness has various results and varies from time to time in the same individual and under differing circumstances. The terms "Psychosis", "Involutional Depressive Reaction" are merely slogans, or terms, and without expert medical opinion are meaningless. They must be related to the person and to the time and circumstances. As was said in *Carter v. United States*, 102 U.S. App. D.C. 227, 236, 252 F.2d 608, 617 (1956):

> "Mental 'disease' means mental illness. Mental illnesses are of many sorts and have many characteristics. They, like physical illnesses, are the subject matter of medical science. They differ widely in origin, in characteristics, and in their effects on a person's mental processes, his abilities, and his behavior. To make a reasonable inference concerning the relationship between the disease and a certain act, the trier of the facts must be informed with some particularity. This must be done by testimony. Unexplained medical labels – schizophrenia, paranoia, *psychosis*, neurosis, psychopathy – are not enough. Descriptions

> and explanation of the origin, development and manifestation of the alleged disease are the chief functions of the expert witness." (Emphasis added.)

There is a genuine issue of material fact as to the mental illness and its traumatic effect which has not yet been decided. The Court of Claims' Rule 64(d) precludes summary judgment if such issue exists and its own decision in *Gernand v. United States,* 174 Ct.Cl. 936, 939 (1966) reaffirms it.

The Veterans Preference Act, as amplified by Civil Service Regulations, was violated in another fashion. That Act requires the reasons for a discharge be stated in writing and Federal Personnel Manual, Appendix C to Section 5, Procedures under Part 22, Sec. A.2, requires these additional safeguards:

> "The notice must state any and all reasons supporting the proposed action, specifically and in detail (names, times, places, etc.). The reasons must be given specifically enough, and in sufficient detail, that the employee may understand clearly the alleged grounds for the proposed action, know the particular offenses or deficiencies charged against him, and thus be in a position to submit his defense.****."

Petitioner was charged with conspiracy which required two actors. It is true that in criminal law the name of the co-conspirator need not be given. *Rogers v. United States,* 71 S.Ct. 438, 443, 340 U.S. 367, 375. The Federal Personnel Manual, as noted above, does require that the name be given and the removal procedure was void for that reason alone.

After Petitioner's case the lower court decided *Urbina v. United States,* No. 113-63, May 12, 1967, as yet unreported. Petitioner's Motion for Reconsideration invited the court's

attention to this case (R 108). which voided *Urbina*'s removal. *Urbina* was accused of making a false claim for a rental allowance for a house which he allegedly owned in Okinawa. When this allegation was disproved, the Government changed its reasons for the removal contending he made a false claim representing that he owned the house. The lower court held this change of positions unfair. It went further, however, holding intent to cheat was required and that *Urbina* had given plausible explanations of why title documents were made out as they were. The house was titled in the name of *Urbina*'s brother-in-law. *Urbina* had agreed to buy the house and that is why he stated he owned it. Petitioner here plausibly and factually explained the title status of the house involved. Title was in the maiden name of his Japanese wife but in *trust* for their daughter. (R 47). He actually paid rents to the trustee (R 47). Petitioner was accurate when he reported he did not own the house, having irrevocably conveyed title to another. He also could not have had intent to commit a fraud. The Government inferred that title being in the maiden name of the wife (R 23, 24) somehow showed fraud. Petitioner explained this (R 26) saying "I must refer you to Japanese law as the same applies to Okinawa as to identity of persons" (R 26).

The lower court dismissed Petitioner's complaint saying that he was in this dilemna: If the court upheld the Civil Service Commission's holding that the illness was not an acceptable excuse then the untimely appeals constituted a failure to exhaust administrative remedies but if the court excused the tardiness of the appeals and accepted the existence of the debilitating illness then Petitioner could not recover because he was "not ready, willing and able to work" (R 97). But part of this dilemna was invoked by the court *sua sponte*. It added the unpleaded defense of "not ready, willing and able" and this contrary to its Rule 19 requiring that

affirmative defenses be pleaded. The lower court previously struck an unpleaded affirmative defense in *Gmo. Niehaus & Co. v. United States,* 373 F.2d 944 (1967). Petitioner has, therefore, been denied equal application of the court's own rules. He is as entitled to the benefit of that rule as was that company.

In view of the lack of medical evidence as to the traumatic effect of the mental illness, both as to the timeliness of the appeal and to his ability to work, this case was not ripe for summary judgment.

II.

A FEDERAL EMPLOYEE ANSWERING A NOTICE OF PROPOSED REMOVAL FROM EMPLOYMENT HAS A FIRST AMENDMENT RIGHT TO INCLUDE HIS PETITION FOR REDRESS OF GRIEVANCES AND A FAILURE BY THE GOVERNMENT TO MEANINGFULLY PROCESS IT IS A SUBTLE INTERFERENCE WITH A CONSTITUTIONAL RIGHT VOIDING THAT EMPLOYEE'S REMOVAL FROM EMPLOYMENT.

Amendment I to the Constitution of the United States provides for a Petition for Redress of Grievances as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In *Swaaley v. United States,* No. 405-65, decided May 12, 1967, as yet unreported, the Court of Claims ruled that federal employees have the right to petition their agencies for redress of grievances and that the statements contained therein

could not be used as grounds for removal, unless such statements were made with knowledge they were false or with reckless disregard of their falsity relying on the libel principle in *New York Times v. Sullivan,* 376 U.S. 254 (1964). *Swaaley,* however, appears to be in conflict with the 2 to 1 opinion of the United States Court of Appeals for the District of Columbia Circuit in *Turner v. Kennedy,* 118 U.S. App. D.C. 104,332 F.2d 304 (1964), Judge Fahy dissenting. The majority did not render an opinion but the facts were stated by Judge Fahy. Here a federal employee was held properly discharged for alleged false statements made to Congress. Judge Fahy dissented contending that such statements were privileged since they were made under the protection of the First Amendment right of Petition for Redress of Grievances and by 5 U.S.C. 652(d), 62 Stat. 356 (1948) giving federal employees the right to petition Congress which right shall not be denied or interfered with.

A conflict therefore exists between two Courts of the United States which Petitioner believes this Court should settle.

Here, Petitioner's statements were not slanderous, but were made with good intentions and with a belief that they were true. In response to the proposal advising of intent to remove him he asked for an investigation calling attention to the fact that the charges arose out of conditions at his place of employment and that there had been another attempt to remove him that had no substance and never materialized. In his letter to the San Francisco Region, Civil Service Commission, he said that he had been ganged upon through a whipering group and because of a political wrangle in his unit. He became specific in his letter to the Civil Service Commission (R 45, 46, 47) more fully related under Statement of the Case but which in short stated:

"In the organization to which I was assigned was a woman employee who became my subordinate and who had tried to get the job to which I was assigned but failed for lack of qualifications. This woman at the outset and throughout my tenure of the job conspired with the military superiors to discredit me in order to get my job. The writer is 1/20th colored and this fact was suspected and used by this woman to spread rumors and hate among assigned personnel. This continued with each succeeding officer so that at various times it was proposed to abolish my job, reduce my grade and other harassing tactics used. When a new Commander was assigned the same process was used over and over. Then in 1960 a new deputy to the Commander was assigned and it soon became apparent that they did not see eye to eye. I was loyal to the Commander as required by my job and this major was from Little Rock, Arkansas so this woman quickly sought to appeal to his aversion to a person with color. Because of his dissention (sic) with the Commander the organization suffered and in 1960 an IG annual inspection of the organization was severely critical. The deputy tried to place the blame for the poor showing of the organization on me since because of rank he could not blame the Commander, a Lt. Colonel. Finally through political and fraternal associations he succeeded in having the Commander relieved of his post and avowed to get me."

The statements in all three of his petitions have never been controverted by the Government and on summary judgment must be taken as true. *Turner v. Kennedy, supra,* dissent, 332 F.2d pp. 304-305.

Here, Petitioner's first statement of grievances was before his removal and in answer to the charges. Whatever happened to his letter of grievances has never come to light and whether it was a contributing factor for his discharge cannot be determined without a hearing on the merits. This petition and the

two forwarded to the Civil Service Commission required some meaningful processing and a mere receiving of it without any transmittal to proper effective authorities is a governmental stifling of a fundamental right. Compare *Bates v. City of Little Rock,* 361 U.S. 516, 523, 80 S.Ct. 412.

This removal is void because of violation of Petitioner's right to Petition for Redress of Grievances.

CONCLUSION

For the reasons stated herein, Petitioner prays that a Writ of Certiorari issue to review the erroneous and unfair judgment of the United States Court of Claims.

Respectfully submitted,

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Counsel for Petitioner

In the United States Court of Claims

No. 207–65

(Decided April 14, 1967)

GEORGE A. WALKER v. UNITED STATES

Lawrence J. Simmons, attorney of record, for plaintiff. *Edgar H. Twine*, with whom was *Assistant Attorney General Barefoot Sanders*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PER CURIAM: Plaintiff, a veteran's preference eligible, was formerly an administrative assistant for the Air Force at a military base on Okinawa. On December 21, 1961, he was removed from this civilian position for conspiring to defraud the Government. In its removal notice to plaintiff, the Air Force outlined his appeal rights both within the Air Force and before the Civil Service Commission. In spite of this advice, plaintiff did not appeal his dismissal until March 22, 1964 when he appeared before the San Francisco regional office of the Civil Service Commission. The regional office found that 1) he had been fully advised of his appeal rights and 2) his claim that illness prevented a timely appeal was without merit. It then denied his appeal. On April 8, 1964, the Civil Service Commission's Board of Appeals and Review affirmed this decision. It denied reconsideration of the decision. Plaintiff then filed suit for back pay in this court on July 1, 1965. Defendant now moves for summary judgment.

256-882—67

Plaintiff opposes this motion by asserting that there exists a factual question that is dispositive of the case. But that question is not material and need not block this motion for summary judgment. Granted that the question is dispositive. But either way that it is resolved will force a judgment against plaintiff.

Plaintiff claims that he had "a mental disease, defect, and retardation" going back at least nine months prior to June 14, 1962 and that this illness left him unable to initiate a timely appeal before the Civil Service Commission. If the court upholds the Commission's holding that his illness was not an acceptable excuse, plaintiff would be barred from this court because his untimely appeals constitute a failure to exhaust administrative remedies. See, *e.g.*, *Adler* v. *United States*, 134 Ct. Cl. 200, 146 F. Supp. 956, *cert. denied*, 352 U.S. 894 1956); *Heffernan* v. *United States*, 133 Ct. Cl. 839 (1956); *McDougall* v. *United States*, 138 Ct. Cl. 90, 149 F. Supp. 651 (1957); *Hutton* v. *United States*, 154 Ct. Cl. 34 (1961). If the court would excuse the tardiness of the appeals and accept the existence of plaintiff's debilitating mental illness, plaintiff could not recover because of his failure to be ready, willing, and able to work for the period encompassed in his claim. *United States* v. *Wickersham*, 201 U.S. 390, 399, 400 (1906); *Armand* v. *United States*, 136 Ct. Cl. 339 (1956); *Corrigan* v. *United States*, 153 Ct. Cl. 392 (1961); *Alpert* v. *United States*, 161 Ct. Cl. 810 (1963). Thus with either factual resolution, plaintiff cannot recover. He is only left with a choice between Scylla and Charybdis.

Any rights that plaintiff might have for disability retirement pay (See 5 C.F.R. § 29.6 (1961 ed.), are not to be considered at this time inasmuch as plaintiff says that "[t]he complaint nowhere states that [the] suit is for disability retirement."

Therefore, defendant's motion for summary judgment should be granted, and plaintiff's petition dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1967

IN THE UNITED STATES COURT OF CLAIMS

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207-65 GEORGE A. WALKER v. THE UNITED STATES

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ORDER

These cases come before the court on motions for reconsideration, rehearing, amendment of judgment, to review and vacate judgment, and for further relief under Rules 68 and 69 of the Tules of this court and, on consideration thereof,

IT IS ORDERED this 20th day of July 1967, that said motion be and the same are denied as follows:

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207-65 George A. Walker, Plaintiff's motion for reconsideration.

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BY THE COURT

/s/ Wilson Cowen

Chief Judge

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 744

GEORGE A. WALKER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We respectfully invite the attention of the Court to the following facts which show that the petition was filed out of time:

On April 14, 1967, the Court of Claims granted the government's motion for summary judgment in this case and ordered the dismissal of the action (Pet. App. A–1—A–2). A petition for rehearing was denied on July 20, 1967 (Pet. App. A–3). The period for filing a petition for a writ of certiorari expired on Wednesday, October 18, 1967. The petition was not filed until October 19, 1967, 91 days after the Court of Claims' denial of rehearing.

Section 2101(c) of Title 28 provides that "any writ of certiorari intended to bring any judgment or de-

281-650—67

cree in a civil action * * * before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." Since these limits are jurisdictional, the petition should be dismissed as untimely.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

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